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SYMPOSIUM: LAW AND ECONOMICS AND LEGAL SCHOLARSHIP

SYMPOSIUM EDITOR
HORACIO SPECTOR

FOREWORD

Horacio Spector 345

GOVERNANCE STRUCTURES, LEGAL SYSTEMS, AND THE CONCEPT OF LAW

Lewis A. Kornhauser 355

Debate over the concept of law currently contrasts conceptual and interpretive accounts. This Article begins to elaborate a social-scientific conception of law as a subset of a concept of a governance structure. To begin, it distinguishes institutional structures, realized institutions, and functioning institutions. Governance structures consist of institutional structures that perform central tasks of governance. Dworkin's interpretive conception of law extends over the domain of functioning institutions; positivist, conceptual accounts of law extend over the domain of institutional structures. From this perspective legal systems may be best understood as governance structures that satisfy the political value legality; different concepts of law offer different accounts of the value of legality and its relation to other political values of justice.

WHAT LEGAL SCHOLARS CAN LEARN FROM LAW AND ECONOMICS

Anthony Ogus 383

The starting point of this Article is Richard Posner's statement of regret (in 1975) that, in terms of legal scholarship, "normative analysis vastly preponderates over positive," and that this can be corrected by the economic analysis of law. I consider that the positive, predictive contribution of law and economics is still undervalued. Lawyers, practitioners and academics, have much to learn from economic analysis because so often they fail to understand the nature of the interaction between law and market phenomena. This Article explores three areas of analysis to justify this contention: the interplay between public and private incentive systems to induce behavioral change; the *ex ante*, *ex post* dilemma in the application of legal rules; and comparative law and rule-formulation.

The second part of the Article shifts to what may be described as the explanatory or interpretative function of law and economics. Traditionally legal scholarship has centered on promoting the coherence and systematic orderliness of the law and the explanatory approach can make a major contribution to this. Because law and economics cuts across traditional legal conceptual structures, and indeed legal systems and cultures, it provides a valuable tool for understanding the relationship between different parts of the legal systems and between different systems. More controversially, I also contend that an economic interpretation helps to resolve the ambiguities and uncertainties that inevitably arise when legal entitlements are based on notions of morality and corrective justice.

THE UNEXPECTED GUEST: LAW AND ECONOMICS,
LAW AND OTHER COGNATE DISCIPLINES,
AND THE FUTURE OF LEGAL SCHOLARSHIP *Thomas S. Ulen* 403

This Article argues that law and economics has worked a remarkable but unexpected change on legal scholarship. Many critics mistakenly claim that the most notable effect of law and economics lies in its conclusions about substantive legal rules. This Article argues that this criticism misses the far more radical effect of law and economics on the study of law—namely, its commitment to the scientific method of inquiry, a method that relies upon theorizing, then performing empirical work to verify or refute the theory, and then refining the theory in light of the results. The Article explains why this change has occurred, what paths it is likely to travel in the near future, and how this effect of law and economics is likely to be more lasting and profound than the effects of other recent innovations in legal scholarship, such as law and society and law and philosophy. Law and economics' changes on the prevailing norms and methods of legal scholarship has brought law schools more firmly within the scholarly traditions prevailing in other academic disciplines within research universities but may have distanced the work of law professors from the concerns of the legal profession.

FUNCTIONAL LAW AND ECONOMICS:
THE SEARCH FOR VALUE-NEUTRAL
PRINCIPLES OF LAWMAKING

Francesco Parisi 431
and Jonathan Klick

Functional law and economics, which draws its influence from the public choice school of economic thought, stands as a bridge between the strictly positivist and normative approaches to law and economics. While the positive school emphasizes the inherent efficiency of legal rules and the normative school often views law as a solution to market failure and distributional inequality, functional law and economics recognizes the possibility for both market and legal failure. That is, while there are economic forces that lead to failures in the market, there are also structural forces that limit the law's ability to remedy those failures on an issue-by-issue basis. The functional approach then uses economic tools to analyze market and legal behavior in order to create meta-rules which limit the extent of the failures in each realm. These meta-rules are designed to induce individuals to reveal their preferences in cases where collective choices are necessary, and to internalize the effects of their actions generally. This mechanism design or functional approach to law and economics focuses on *ex ante* social welfare maximization, rejecting both the *ex post* corrective function of law assumed by the normative school of thought and the naturally evolving efficient system view espoused by the positive school.

SHOULD LAW PROFESSORS TEACH
PUBLIC CHOICE THEORY?

Guido Pincione 451

This Article argues that various philosophically interesting objections to the use of public choice theory in legal education are misguided. Some writers hold that public choice theory, being descriptive, cannot help law students develop the interpretive skills needed by judges and lawyers. I reply that this objection rests on the false assumption that public choice theory lacks resources to accommodate rule following. Others object that public choice theory fosters cynicism and uncooperative attitudes. This rests on an unduly restrictive conception of the theory of rationality presupposed by public choice analysis. The public-choice focus on efficiency has also been disputed. In reply, the author shows that (i) Pareto efficiency is arguably a necessary requirement of distributive justice, (ii) we may have a moral duty to teach wrong principles, and (iii) public choice theory is instrumental to the realization of any ideal of distributive justice. The author also addresses Anthony T. Kronman's objection that legal education should be about case-by-case balancing, and as such makes no room for public choice analysis. The author's reply is that familiarity with public choice theory helps students identify the territories where genuine legal argument, rather than op-

portunistic bargaining, holds out hope of being persuasive. Finally, against those critics that allege that public choice theory is predictively inaccurate, the author shows that this shortcoming, even if genuine, need not prevent the theory from spotting hidden factors or guiding us towards institutions that economize on virtue.

LEGAL ANALYSIS OF ECONOMICS:
SOLVING THE PROBLEM OF RATIONAL
COMMITMENT

Bruce Chapman 471

This Article offers a "legal analysis of economics" in contradistinction to the prevailing "economic analysis of law." The economic problem that forms the subject matter of the theoretical legal analysis is the problem of rational commitment. The difficulty here is that an agent can have a reason, or a preference, to commit to do something that he will have no reason actually to do, or which will be contrary to preference when the time comes actually to do it. Familiar examples include the problem of making credible threats or promises.

This Article develops an account of the rational actor that differs from that conventionally supplied by rational choice theory to handle this problem. Borrowing from some work by the philosopher-economist John Broome, the Article argues that rational decision-making involves more than acting on the balance of reasons, or all-things-considered preferences; it also consists in following the normative requirements of practical rationality. After articulating the logical distinction between reasons and normative requirements, the Article argues that this richer account of the rational actor is manifested in common law adjudication and, more particularly, in the special relationship that exists between decided cases and defeasible legal rules. The Article suggests that this is exactly the sort of rationality that the economist needs to comprehend, and solve, the problem of rational commitment.

GÖDEL, KAPLOW, SHAVELL:
CONSISTENCY AND COMPLETENESS
IN SOCIAL DECISION-MAKING

Giuseppe Dari Mattiacci 497

The recent debate on what criteria ought to guide social decision-making has focused on consistency: it has been argued that criteria contradicting one another—namely, welfare and fairness—should not be simultaneously employed in order for policy assessment to be consistent. This Article raises the related problem of completeness—that is, the question of whether or not a set of consistent criteria is capable of providing answers to all social decision problems. If not, as it is suggested might be the case, then the only way to decide otherwise undecidable issues is to simultaneously employ both welfare and fairness, which implies a certain degree of inconsistency within the system.

FAIRNESS AND WELFARE FROM A
COMPARATIVE LAW PERSPECTIVE

Horacio Spector 521

This Article discusses the relative value of law and economics and moral philosophy to explain private law in both common law and civil law jurisdictions. It argues that the recent philosophical paradigm, which revolves around the ideas of fairness and autonomy, is intellectually continuous with the School of Rationalist Natural Law. Though this School has been directly influential on the development of civilian private law, its ascendancy on common law cannot be documented. Paradoxically, recent philosophical explanations of private law bear on common law, while legal philosophers in civil law jurisdictions still follow Kelsen's research agenda, which focuses on the structural properties of law.

The Article seeks to show that the relative importance of law and economics and moral philosophy to explain private law varies depending on the jurisdiction. In civil law jurisdictions, moral philosophy is more important because civilian institutions, such as contracts and torts, have been shaped by the ideas of autonomy and fairness. In common contract and tort law, however, those moral ideas have been relegated to a peripheral position. The Article provides illustrative examples and emphasizes that law and economics is also necessary to explain many features of civil law.

THE KENNETH M. PIPER LECTURES

THE TRANSFORMATION OF THE PROFESSIONAL WORKFORCE

Marion Crain 543

For professionals, work is not a commodity to be sold on the market, but a calling that constitutes personal identity while simultaneously conferring a relatively privileged class status. Historically, the professions avoided commodification through a social bargain in which they exchanged their professional expertise and dedication to public service for autonomy, the ability to self-regulate through peer review, and monopoly power over their knowledge base. Over the last twenty-five years, market instability and technological development have fundamentally altered the conditions under which this social bargain was formed, and the professional class has been transformed from self-employed to salaried employee status. New profit-maximizing strategies and updated scientific management techniques are threatening to commodify professionals and generating widespread interest in professional unions. This Article examines the forces that are prompting unionization in the medical profession and the legal profession, assesses unionization and collective bargaining as effective vehicles for the defense of professional identity, addresses potential barriers posed by the Court's interpretation of the labor laws, and outlines an argument for coverage of professionals by the NLRA that is grounded in the commodification process.

COMMENTARY: ORGANIZED PROFESSIONALS CAN BE EFFECTIVE PRODUCERS

Robert M. Tobias 617

THE CHANGING WORLD OF EMPLOYEE BENEFITS

Maria O'Brien Hylton 625

The employee benefits picture, at least for many plan participants and some plan sponsors, is a scary and bleak one. The number of workers with pension coverage is declining, health insurance rates are rising much faster than the rate of inflation, and the number of uninsured continues to rise as well. The decline in union density, the recent boost given by the U.S. Supreme Court to Any Willing Provider ("AWP") laws, and the deluge of recent benefits-related scandals are also all part of this landscape. This Article examines each of these issues, with a focus on reforms that would increase pension and health insurance coverage rates.

The first argument is that the path toward reform will be profoundly affected by the nature of the conversation about the problems employers and employees face in trying to reach an optimal level of benefits coverage. The Article proposes the adoption of a non-emotional, non-value laden framework that takes into account the stark economic realities both parties face. The problem of declining union density and its implications for the assertion of employee bargaining power are considered next. With respect to health insurance, the Article looks at recent experience with small employer purchasing groups and makes a controversial proposal that employees be permitted to trade cash for benefits. Finally, the Article asserts that in cases of fraud and malfeasance (highlighted by recent scandals) the core problem is one of sub-optimal deterrence. The solution is an amendment to ERISA that would permit a punitive damage sanction in cases of egregious employer/plan sponsor behavior.

COMMENTARY: IS IT TIME TO TAKE THE BROOM AND REALLY CLEAN HOUSE?: A NEW PARADIGM FOR EMPLOYEE BENEFITS

Mary Ellen Signorille 655

THE LOUIS JACKSON NATIONAL STUDENT WRITING COMPETITION

REASONABLE ACCOMMODATION UNDER
THE ADA: ARE EMPLOYERS REQUIRED TO
PARTICIPATE IN THE INTERACTIVE PROCESS?
THE COURTS SAY "YES" BUT THE
LAW SAYS "NO"

John R. Autry 665

The Americans with Disabilities Act ("ADA") generally requires employers to "reasonably accommodate" a "qualified" employee's disability. Unfortunately, the ADA is silent as to the appropriate method for fashioning reasonable accommodations. The Equal Employment Opportunity Commission ("EEOC") issued regulations endorsing an "interactive process" by which an employer and its "qualified" disabled employee work together to devise the proper accommodation. However, the Supreme Court has yet to determine whether courts must defer to these regulations, leaving the circuit courts of appeals to issue differing opinions on whether the EEOC's interactive process is best characterized as a requirement or merely a suggestion.

Thus, the circuits appear to be split over the issue of liability for a failure to engage in the EEOC's interactive process. However, upon close examination, there is no circuit conflict. The EEOC regulations are not written in mandatory terms and are best understood as not imposing independent liability for a failure to interact. Further, no circuit truly mandates that employers interact, and the ADA itself would not permit such a mandate. On that basis, while interaction with a disabled employee can prove both prudent and valuable, an employer is not required to interact when fashioning a reasonable accommodation for its disabled employee.

RECOVERING RETIREMENT SECURITY:
AN ANALYSIS OF THE LOCKDOWN CLAIMS
UNDER ERISA, AS ILLUSTRATED BY THE
ENRON LITIGATION

Margo Eberlein 699

This Note discusses Enron's lockdown of its 401(k) plan, the effect this decision had on Enron employees' pension funds, and the legal implications of this decision under the current statutory framework, ERISA. It describes the lawsuit filed by Enron employees in an attempt to recover some of the lost funds, as well as the probability of success for that action specifically and similar actions under ERISA in the future.

STATE EMPLOYERS ARE NOT SOVEREIGN:
BY ANALOGY, TRANSFER THE MARKET
PARTICIPANT EXCEPTION TO THE
DORMANT COMMERCE CLAUSE TO
STATES AS EMPLOYERS

Lara Gardner 725

States should be treated as market participants and not be given sovereign immunity under the Eleventh Amendment when they are acting as private employers. Through an expansive reading of the Eleventh Amendment, the Supreme Court has restricted the right of state employees to sue under federal statutes intended to protect employees when the state is the employer and claims sovereign immunity. Under the market participant exception to the dormant Commerce Clause, if a state is acting as a market participant, rather than as a market regulator, it is no longer bound by the restraints of the Commerce Clause. The reasons states acting as employers should be treated as market participants rather than sovereigns are as persuasive as the arguments supporting the market participant exception. This doctrine should be transferred by analogy from its exclusive application in the dormant Commerce Clause context to include instances when states are acting as employers and thus, market

participants. Traditionally, the market participant exception has worked to states' benefit, allowing them to act in the same capacity as a private company without Commerce Clause concern. As an employer, a state is not acting in its regulatory capacity. Rather, it is acting as a private actor. Therefore, it should be treated as a market participant and should not be able to evade regulation by claiming sovereign immunity. If states are going to enjoy the same benefits as private employers, they ought to be subject to the same limits as well.

STUDENT NOTES AND COMMENTS

SUMMERLIN V. STEWART AND RING RETROACTIVITY

Tonya G. Newman 755

The Sixth Amendment guarantees criminal defendants a trial before a jury. Until the Supreme Court decided *Ring v. Arizona*, however, nine states wholly or partially surrendered a portion of the jury's role to a sentencing judge. Specifically, those states allowed sentencing judges to make factual determinations regarding sentencing considerations by which capital defendants became eligible for the death penalty. The *Ring* Court halted the use of sentencing considerations to erode the jury's fundamental role in preserving accuracy and fairness of criminal proceedings, holding that the Sixth Amendment requires that a jury make factual findings on all elements, including sentencing considerations. Most courts considering the extent to which the rule in *Ring* will be available to those capital defendants already sentenced have held that *Ring* is unavailable to those defendants whose cases have become final. This Comment analyzes *Summerlin v. Stewart*, the recent Ninth Circuit case now pending before the Supreme Court. The author argues that the *Summerlin* court correctly held that, as both a substantive and a procedural rule, *Ring* must apply retroactively on collateral review.

THE LAW AND ECONOMICS OF SECURITIES FRAUD: SECTION 29(A) AND THE NON-RELIANCE CLAUSE

David K. Lutz 803

This Note examines whether precluding a plaintiff from claiming reasonable reliance on representations made outside of a final written agreement containing a non-reliance clause violates Section 29(a) of the Securities Exchange Act of 1934. The Note uses the Third Circuit's recent decision in *AES v. Dow Chemical Co.* to put the issue in context, and concludes that the court reached the wrong conclusion. By accepting the assumptions of law and economics, and addressing the arguments against such an approach from behavioralists and other critics, the Note argues that adopting a clear rule enforcing non-reliance clauses produces certainty in contractual dealings, leads to efficient outcomes, and will reduce the occurrences of fraud. As opposed to adopting a standard recognizing investors' cognitive vulnerabilities, this Note advocates for the adoption of a clear rule enforcing non-reliance clauses to preclude reasonable reliance as a matter of law against sophisticated parties in an arm's length transaction.